Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of | ) | |
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| Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers | ) | CC Docket No. 01-338 |
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| Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |
| | ) | |
| Deployment of Wireline Services Offering Advanced Telecommunications Capability | ) | CC Docket No. 98-147 |

**REPLY COMMENTS OF ALCATEL USA, INC.**

Alcatel USA, Inc., hereby submits these Reply Comments to the Federal Communications Commission's ("FCC" or "Commission") Triennial Review of its network element unbundling rules.[1] Alcatel is a wholly-owned subsidiary of Alcatel S.A., a manufacturer of telecommunications and Internet equipment headquartered in France. Globally, the Alcatel group is a leader in digital subscriber line equipment,[2] terrestrial and submarine optical networks,[3] satellites, public switching, fixed wireless

[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Service Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, FCC 01-361 (rel. Dec. 20, 2001) ("*NPRM*").

[2] According to a recent Report by the Dell'Oro Group, Alcatel is the worldwide leader in the DSL market in 2001. Globally, Alcatel shipped 38% of cumulative port shipments in the first quarter 2002, which is over three times that of its nearest competitor. In North America, Alcatel's market share was 78% at the end of first quarter 2002, which is ten times that of its nearest competitor. http://www.delloro.com/

[3] Alcatel recently agreed to a multi-year contract with SBC Communications to provide a fiber to the user solution in the San Francisco area. Alcatel will provide its 7340 FTTU passive optical network solution

access, and intelligent networks. As is well known to the Commission, the telecommunications equipment market is in a significant decline as capital expenditures in the industry have declined from $113 billion in 2000, to $93 billion in 2001, to an estimated $51 billion in 2002.[4] Alcatel strongly urges the Commission to address the issues raised in this NPRM in an expeditious manner in order to mitigate the regulatory uncertainty that currently exists in the local communications market.[5]

## I. The USTA Decision Provides the Commission with Additional Justification to Reduce the Unbundling of ILEC Network Elements, Particularly Elements Deployed to Provide Broadband Services.

The opinion of the U.S. Court of Appeals for the D.C. Circuit in *United States Telecom Association v. FCC*[6] ("USTA") provides the Commission with additional justification to reduce the network element unbundling requirements for the ILECs, particularly for those elements deployed to provide broadband services. In *USTA*, the D.C. Circuit reversed and remanded both the *UNE Remand Order* and the *Line Sharing Order* to the Commission and demanded the Commission expand its unbundling analysis to include geographical and customer characteristics as well as intermodal competition in the broadband market. In vacating the Line Sharing Order, the Court recognized that the unbundling of the high frequency portion of the local loop was unjustified since the

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that is capable of providing users with voice, data, and video services. In the end, it is estimated this service will be provided to 6,000 residential customers.

[4] James P. Parmelee, *Telecom Equipment – Wireline Update* at 2, Credit Suisse First Boston, June 26, 2002.

[5] Letter from Matthew Flanigan, Telecommunications Industry Association, to Michael Powell, Federal Communications Commission, June 4, 2002 (urging the Commission to rules on the unbundling of new, last mile broadband facilities within 90 days).

[6] *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C.Cir. 2002) ("USTA"). On July 8, 2002, the Commission filed a *Petition for Rehearing or Rehearing En Banc* with the D.C. Circuit concerning this decision.

original analysis failed to consider the ILECs lack of market power in the broadband market as a whole and the availability of competing platforms to consumers.

Alcatel urges the Commission to rely on this decision to support its proposal in the Triennial Review NPRM imposing customer and geographical "carve outs" for all of the UNEs and to remove unbundling obligations for new broadband facilities on the customer side of the central office. In *USTA*, the Court's opinion vacating the line sharing order due to the ILECs' lack of market power in the broadband market is consistent with the Commission's own conclusions in its §706 Reports and numerous comments by interested parties that a broadband market analysis cannot be limited exclusively to DSL. Instead, the Commission must recognize that the scope of the broadband access market is broader than DSL and includes multiple platforms (such as cable modem) that the ILECs fail to possess even a plurality market share, and this lack of market power disqualifies these network elements from the unbundling obligations of §251.

## II. Alcatel Supports the Comments and Reply Comments of the High Tech Broadband Coalition.

In matters other than those specifically mentioned in its Comments[7] and these Reply Comments, Alcatel fully supports the positions advocated by the High Tech Broadband Coalition ("HTBC"). The HTBC is an ad hoc association of several high tech trade associations that represents the equipment manufacturing, consumer electronics, semiconductor, and general manufacturing industries, but it specifically excludes competitive or incumbent local exchange carriers. The general position of the HTBC,

[7] *Comments of Alcatel USA, Inc*., CC-01-338, filed Apr. 5, 2002.

that the Commission should remove any unbundling obligations of the ILEC for broadband facilities on the customer side of the central office,[8] is fully consistent with Alcatel's position.

## III. Alcatel Supports the General Concepts and Conclusions of the CSMG Study Provided by Corning in its Comments to the Commission.

Alcatel hereby proclaims its full support for the unbundling cost conclusions stated within the CSMG study submitted by Corning in its Comments to this proceeding.[9] The CSMG study engaged in a comprehensive economic analysis of the costs associated with unbundling and the detrimental impact such obligations have on the deployment of Fiber-to-the-Home ("FTTH") technology. As a leading vendor in the optics market, Alcatel fully agrees with the conclusions of CSMG that these obligations will result in a significant decline in FTTH deployment by the ILECs.

Alcatel's support of this study, however, does not extend to some of the various statements made in Corning's Comments that advocate a Commission policy in which FTTH would receive preferential regulatory treatment and be segregated from other broadband technologies. As Alcatel stated in its Reply Comments in the Commission's proceeding to determine whether the ILECs should be held nondominant in the broadband market,[10] the Commission should maintain its technology neutral approach and not base the unbundling obligations of the ILECs exclusively on the means of delivering broadband services.

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[8] *Comments of the High Tech Broadband Coalition*, CC 01-338, filed Apr. 5, 2002.

[9] Cambridge Strategic Management Group, *Assessing the Impact of Regulation on Deployment of Fiber to the Home: A Comparative Business Case Analysis* (Apr. 5, 2002), attached as exhibit I to the *Comments of Corning*, CC-01-338, filed Apr. 5, 2002.

[10] *Reply Comments of Alcatel USA, Inc.*, CC-01-337, filed Apr. 22, 2002, at 7-11.

## IV. The Commission Should Formally Declare that NGDLC Line Cards are not Subject to the Commission's Unbundling Rules and Preempt Continued State Inquiries Into this Issue.

In Paragraph 11 of the NPRM, the Commission noted that the record of several proceedings related to local competition and access to the ILEC network would be incorporated into this proceeding in order to gather a complete record.[11] Specifically, the Commission included the pending proceedings that addressed next-generation networks, which includes the issue of whether a requesting carrier may physically or virtually collocate its line card at the remote terminal ("RT") by installing it in the incumbent's Digital Loop Carrier ("DLC") for the purposes of line sharing.[12]

Alcatel strongly urges the Commission to accelerate its review of this issue and conclude that a requesting carrier cannot be entitled under §251 to physically or virtually collocate its line card at the ILEC's RT. Alcatel, which has a market leading position in the manufacture DSL equipment in the United States, has consistently and repeatedly argued before the Commission and state regulatory authorities that line cards are not separate components that can be feasibly unbundled in a manner proposed by competitive carriers.[13] This matter is of increased importance since the Commission began examining this issue due to the number of state regulatory authorities that have initiated inquiries while the Commission's proceeding was pending. Multiple state inquiries necessitate

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[11] *NPRM*, at ¶11.

[12] *In the matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Further Notice of Proposed Rulemaking, CC-98-147, (rel. Jan. 19, 2001) 16 FCC Rcd 2101, ¶56.

[13] *See Comments of Alcatel*, CC-98-147, CC 96-98 (filed Oct. 12, 2000); *Reply Comments of Alcatel USA, Inc*., CC-98-147, CC-96-98 (filed Nov. 14, 2000), *Comments of Alcatel USA, Inc*., CC-98-146 (filed Sep. 24, 2001), and *Reply Comments of Alcatel USA, Inc*., CC-98-146(filed Oct. 9, 2001). Alcatel actively participated in the Commission's May 10, 2000, *Public Forum on Competitive Access to Next Generation Remote Terminals*. Alcatel has also provided expert testimony in several state unbundling proceedings, most notably before the Illinois Commerce Commission (Case No. 00-0393) and the Indiana Utility Regulatory Commission (Cause No. 40611-S1).

redundant testimony, an exponential increase in expense, compound market uncertainty, and result in asymmetric regulation that increases the compliance costs of carriers and manufacturers.

## A. **Description of NGDLC Line Cards.**

A facilities-based local exchange carrier providing xDSL and POTS service to its customers may locate the Digital Subscriber Line Access Multiplexer ("DSLAM") in either the local central office or in a RT, which is located outside of the central office. An RT is placed outside of the central office when subscribers are in excess of a certain distance from the central office. The RT aggregates the copper loops and places the traffic on to a fiber feed back to the central office, where POTS service and Internet traffic are segregated to be switched or forwarded to the intended destinations. When the DSLAM is placed in the RT it is upgraded with xDSL capabilities and is labeled a next generation digital loop carrier ("NGDLC").

Line cards are internal components of the NGDLC and have no individual stand alone capabilities. Line cards are simply printed circuit boards that consist of components such as chip sets, resistors, and solder points. These components, in conjunction with the proprietary NGDLC system software, allow for the provisioning of certain service features and functions. The line cards themselves are specially designed to fit within and interact with the slots, which are hard wired to the system back plane. There was never any intent for these components to work in the NGDLC systems of other vendors and vice versa.

**B. Line Card Unbundling Has Numerous Consequences.**

A number of issues must be considered and addressed in the Commission's analysis of the line card unbundling issue. Arguments that line cards from different vendors can simply be interchanged or "plugged-in" to various NGDLC systems are inaccurate and fail to truly demonstrate the complexity of this matter and the seriousness of the potential consequences.

First, line cards manufactured by third party manufacturers would simply not fit within the specially designed slots in the NGDLC. These cards are specifically designed to fit within the slot and have matching pin designs to operate within the system capabilities. The introduction of a foreign line card would necessitate a modification of the entire board component of the NGDLC to make the system receptive to the third party components, something that would require great expense and, potentially, a standardization among all of the various vendors.

Second, the NGDLC is operated by proprietary software that controls the entire system as an individual unit, and the potential remedies to the software configuration problem associated with third party line cards are all equally unappealing. Vendors could create numerous software programs to operate in the multiple scenarios where one vendor's line cards are inserted into the NGDLC system of another vendor, which would be an extremely expensive proposition particularly when these costs are considered on a per requesting customer basis compared with the potential revenue of such a customer. Alternatively, NGDLC operational software could be standardized or ILECs obligated to disclose software source codes on demand from the requesting carrier. Consequentially, such a standardization or mandatory disclosure would negate any incentive vendors have

for innovating or differentiating their NGDLC products based on performance. This would have a chilling effect on broadband infrastructure development and deployment.

Third, the introduction of foreign line cards to an NGDLC system would negatively impact the performance warranties for these systems and raise a number of contractual issues. NGDLCs operate under warranties that would be voided if the system failed due to the introduction of a foreign line card. Additionally, carriers that purchase NGDLC systems from manufacturers are provided proprietary information under nondisclosure agreements that preclude unilateral disclosure or assignment of the information necessary for the CLECs to insert and operate foreign line cards.[14] These contracts would have to be amended or nullified in order to accommodate mandatory line card interoperability.

Fourth, forced interoperability of these foreign line cards would result in inherent inefficiencies. For example, each line card controls a number of circuits and each of these circuits would have to be dedicated to the CLEC that implanted the foreign line card in the ILEC's NGDLC. Most likely, the CLEC will not need or have customers that require each of these circuits, thus many will go unused and the system will be prematurely exhausted. Additional problems cited by commenters include secured access to integrate and test the cards and problems with the operational support system.[15] CLEC access to the NGDLC to insert, test, or maintain its line card presents a security issues because this would also provide access to all the line cards in the NGDLC.

Fifth, physical collocation of line cards would create additional risk to network reliability. If the requesting carrier is entitled to access to the NGDLC to insert the

[14] *Reply Comments of the Telecommunications Industry Association*, CC-98-147, CC-96-98, (filed Nov. 14, 2000) at 4.

foreign line card, then an issue arises of which of the parties is responsible if the network suffers a performance failure. As previously discussed, these are integral components of a unified communications system and an operational failure may not be apparently attributable to the incumbent's system or the party that inserted the foreign line card. The resolution of this issue would cause unnecessary delay in addressing the failure and returning the system to operational status.

Sixth, the only appropriate means to create a feasible line card interoperability unbundling regime would be to standardize the line cards and the NGDLC systems, which would negatively impact innovation and development in broadband services provided via RTs. Standardization may provide the necessary hardware and software disclosures to permit interoperable line card plug-ins; however, such standardization would preclude manufacturers from developing enhanced system characteristics because it requires the disclosure of Intellectual Property and innovative technologies, thus significantly limiting the vendors potential return on investment.

## C. The Record Concerning this Issue Has Been Built at the Commission and Before the State Commissions.

### 1. Commission Proceedings.

This issue of whether a requesting carrier may physically or virtually collocate its line card at the remote terminal by installing it in the incumbent's DLC for the purposes of line sharing has been pending before the Commission since 2000 and has been noticed in several proceedings. As noted in ¶11 of the NPRM, the Commission will incorporate a number of pending proceedings as they apply to matters germane to the unbundling of network elements, including but not limited to the third FNPRM in the next generation

[15] *Comments of Verizon*, CC-98-147, CC-96-98 (filed Oct. 12, 2000) at 4.

networks proceeding.[16] Additionally, this issue was thoroughly discussed in the Commission's May 2000 Public Forum on Competitive Access to Next Generation Remote Terminals. In the Third FNPRM, the Commission specifically noticed this issue at ¶56, and numerous parties submitted comments. Prior to the Third FNPRM, Alcatel provided detailed information on this issue[17] in response to the Commissions Second FNPRM as well as in response to the Commission's Third Notice of Inquiry pursuant to §706 of the Act.[18]

In addition to Alcatel, Catena Networks, Inc., ("Catena") also submitted comments concerning this issue in response to the NPRM.[19] Catena and Alcatel are competing vendors that both develop products to provide broadband services to customers served via remote terminals. Alcatel and Catena agree that the Commission should expedite its decision on this issue and "…reject the proposal to impose an obligation for line card collocation."[20]

**2. State Proceedings.**

While it is imperative to reject the proposal that line cards in the RT be unbundled based upon the merits of the arguments presented to the Commission, it is equally important for the Commission to cease further state by state inquiries on this matter.

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[16] *Deployment of Wireline Services Offering advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, and Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 16 FCC Rcd 2101 (2001).

[17] *See Comments of Alcatel*, CC-98-147, CC 96-98 (filed Oct. 12, 2000); *Reply Comments of Alcatel USA, Inc*., CC-98-147, CC-96-98 (filed Nov. 14, 2000).

[18] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Notice of Inquiry, CC-98-146. *See Also*, *Comments of Alcatel USA, Inc*., CC-98-146 (filed Sep. 24, 2001), and *Reply Comments of Alcatel USA, Inc*., (filed Oct. 9, 2001).

[19] *Comments of Catena Networks, Inc*., CC-01-338, filed Apr. 5, 2002.

Continued consideration of this issue has resulted in several state regulatory agencies initiating proceedings on this matter, which has produced asymmetric regulation, disincentives to deploy broadband technologies in certain parts of the nation, and increased expenses related to the testimony in several proceedings. Alcatel strongly urges the Commission to not only reject the line card unbundling proposal but to also exercise the clearly delegated preemption authority provided for in §§251(d)(2), 251(d)(3), and 261(c) of the Act.[21] The following are several examples of state proceedings that address, in whole or part, whether requesting carriers may have collocation rights within the RT to insert foreign line cards in the DLC of the ILEC.

**a. Illinois**

In Illinois, the Illinois Commerce Commission ("ICC") initiated a proceeding on the line card unbundling issue in which it originally held that line cards should be unbundled and tariffed as a "NGDLC UNE-P."[22] Upon this determination, the ILEC in Illinois, SWBT, immediately ceased all "Project Pronto" activity in that state due to the numerous problems associated with this decision.[23] Alcatel provided expert testimony in this proceeding in which it strongly advocated against this proposal. The ICC has since agreed to reconsider this issue recognizing that such a decision may be have several unintended consequences.

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[20] *Id.* at 8.
[21] The Commission's preemption authority on this issue will be discussed in more detail in Part III E of these Reply Comments.
[22] Illinois Commerce Commission, *Proposed Implementation of High Frequency Portion of Loop* (HFPL)/Line Sharing Service, 00-0393.
[23] *See* "Competitive Carriers Lash Out at FCC," Light Reading (May 6, 2002) (visited July 17, 2002) http://www.lightreading.com/document.asp?doc_id=14804.

### b. Indiana

In Indiana, a similar issue has been raised in a proceeding before the Indiana Utility Regulatory Commission ("IURC").[24] In this proceeding, Dr. Neil Ransom, the Chief Technology Officer of Alcatel, provided expert testimony and specific responses to interrogatories from the IURC on several issues, including the issue of line card interoperability. Subsequent to this filing, relevant portions of Dr. Ransom's testimony, which address the issues of standardization of vendor equipment, the inability of one vendor's cards to work within the system of another vendor, and issues concerning CLEC access to NGDLC equipment owned and operated by the incumbent, will be filed as an ex parte to this docket.

### c. Other States

In Tennessee, the regulatory agency finalized its proceeding and ordered line card collocation and interoperability. Additional states have also initiated proceedings to explore line cards and other broadband deployment UNE issues, including Florida and California. The concern is not limited to the result or potential result of these proceedings, rather the chilling effect such inquiries will have on deployment while the state regulatory authority formally or informally considers additional unbundling obligations. Such disparate proceedings and mandates are the precise reasons why the Congress provided the Commission with preemption authority in multiple sections of the Act.

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[24] *In the Matter of the Commission Investigation and Generic Proceeding on Ameritech Indiana' Rates for Interconnection, Service, Unbundled Elements, and Transport and Termination under the Telecommunciations Act of 1996 and Related Indiana Statutes*, Indiana Utility Regulatory Commission, Cause No. 40611-S1.

## D. A Commission Decision to not Unbundle NGDLC Line Cards is Supported by the Act.

### 1. Line Cards are not Separate "Network Elements"

The obligation of ILECs to provide unbundled access to their network is not unconditional or limitless. "Network Element" is defined in the Communications Act as a "…facility or equipment used in the provision of a telecommunications service."[25] In §251(c)(3), Congress specifically conditioned the ILECs' duty to provide requesting carriers with access to network elements on an unbundled basis to "…any technically feasible point."[26] While "…any technically feasible point" is a less than completely objective term,[27] the Commission should interpret that Congress did not want the ILECs unbundling obligation to be limitless or have a detrimental impact on the ILECs' network or network enhancement plans. In fact, the Supreme Court, while discussing the ILECs' ability to control the performance of its own network, recently stated that "…[I]f 'technically feasible' meant what is merely possible, it would have been no limitation at all."[28]

In the case of line card access and interoperability, the Commission must consider whether the individual line cards are "network elements" or simply subsets and

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[25] 47 USC §153(29).
[26] 47 USC §251(c)(3).
[27] In the UNE Remand Order, the Commissioner delegated the broader technical feasibility determination of subloop unbundling to the states due to the fact specific nature of the inquiry. In the more narrow case of line cards, the Commission should conclude that the facts do not vary greatly on a state-by-state basis and continued examinations of this issue will create further delay in NGDLC investment and deployment. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), ¶¶220-229.
[28] *Verizon Telephone Cos., Inc., v. FCC*, 122 S.Ct. 1646 (2002) ("*Verizon*"), slip op. at 66.

components of an element and whether access to the remote terminal to access, place, and test line cards is a "technically feasible" point within the ILEC network. Alcatel has previously testified that its line cards are not individual network elements because they have no individual functionality and must be used within the larger NGDLC system to provide the necessary service capabilities. Furthermore, arguments that line card interoperability is theoretically possible represent the insufficient "merely possible" standard discussed by the Supreme Court and fail to satisfy a reasonable interpretation of the "technically feasible" limitation that Congress specifically included in the §251(c)(3).

**2. Line Cards are Proprietary and Subject to the Heightened Standard Under §251(d)(2)(A).**

Alternatively, even if the Commission were to conclude that line cards are individual "network elements" under the Act and such an unbundling obligation satisfied the "technically feasible point" limitation in §251(c)(3), the Commission would have to satisfy the heightened scrutiny of both §251(d)(2)(A) and (d)(2)(B) because line cards are *proprietary in nature*. In the *UNE Remand Order*, the Commission clarified that a network element is "proprietary" if the ILEC can demonstrate a resource investment, that the network element is protected by patent, copyright, or trade secret law, and that it is not based on widely accepted industry document or standards.[29] Line cards include both software and hardware confidential intellectual property developed by the individual vendor that is not only undisclosed to its competitors but is only offered to customers when protected by nondisclosure agreements and other contractual privacy constraints. They entail significant resource investment by the vendor and are not based on any

widely accepted industry document or on standards commonly used by a standards-setting body ( e.g. ITU, ANSI, IEEE).[30]

Such a "proprietary" network element is "necessary" within the meaning of §251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third party supplier, lack of access to that element would, as a practical, economic, and operational matter, preclude a requesting carrier from providing the services it seeks to offer. If the "necessary" standard is met, then the "impair" standard must also be satisfied in order for the network element to be unbundled and made available to requesting carriers.[31]

In the case of proprietary line cards, a requesting carrier would not, as a practical, economic, and operational matter, be precluded from providing the service it seeks to offer if it did not have access to the RT to collocate its own card. As alternatives, ILECs are prepared to offer derived circuits to the CLECs to a point in the central office where the requesting carrier has collocated. Such access will enable the CLEC to provide the service while avoiding the multiple problems associated with line card interoperability. This scenario is in the best interest of all parties because it protects the network integrity of the ILEC while enabling the CLEC to offer competitive services to its customers.

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[29] *UNE Remand Order*, ¶36.
[30] *Id.*
[31] *UNE Remand Order,* at ¶37.

### 3. The §251(d)(2) Limiting Standard Imposed in the *Iowa Utilities Board* Decision Provides Further Justification to Reject Line Card Access and Unbundling Requirements.

A Commission mandate that requesting carriers have access to RTs to insert foreign line cards into the NGDLC systems of the ILEC would also conflict with the §251(d)(2) limiting standard imposed in the *Iowa Utilities Board* decision.[32] In that decision, the Court held that the "…at a minimum" language included in §251(d)(2) obligated the Commission to consider other goals in the Communications Act beyond the necessary and impair standards of §251(d)(2).[33] In the *UNE Remand Order*, the Commission concluded that several additional factors should be considered in its unbundling analysis, including but not limited to the promotion of facilities-based competition, uniformity and predictability, and whether the unbundling obligations are administratively practical.[34] Additionally, the Commission has requested comment on whether additional factors should be considered in this analysis, particularly its obligations under §706 of the Act,[35] which Alcatel supported in its comments.[36]

#### a. CLEC Access to Remote Terminals and Line Card Interoperability Would Not Promote Facilities-based Competition.

State or Federal rules that entitle CLEC access to the remote terminals of the ILEC to plug-in a foreign line card would not promote facilities-based competition. First, such access increases the reliance a CLEC will have on the ILEC to construct the DLC system and upgrade it to provide broadband capabilities. CLECs would have an increased incentive to rely on these access rights and wait until the ILEC provides the

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[32] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).
[33] 525 U.S. 366, 391-92.
[34] *NPRM*, at ¶9.
[35] *Id*., at ¶21.

necessary investment to enhance the DLC, rather than construct competing wireline facilities or other recognized broadband platforms. Second, ILECs will be hesitant to deploy these systems or upgrade their DLCs to NGDLCs if CLECs are provided this access at §252 rates, terms, and conditions. NGDLCs provide service to customers that may be unable to receive any or certain DSL services because they are located in excess of a certain distance from the ILEC's central office. An NGDLC upgrade is a significant financial expenditure, and the ILECs will have less of an incentive to make such a facilities investment if the CLECs possess this entitlement.

**b. Line Card Interoperability will not Provide Uniformity and Market Certainty.**

The present situation is the least desirable of several scenarios due to the Commission's inaction on this issue and the multiple ongoing state inquiries. If the Commission does not reject the line card interoperability proposal, then market uncertainty in the carrier and vendor markets will continue. As previously illustrated, mandatory line card interoperability will result in numerous other issues concerning hardware and software design, intellectual property protection, and legal and contractual rights. Moreover, if the Commission fails to exercise its preemption authority, then the market uncertainty will be compounded by the potentiality of additional state inquiries and mandates. The vendor market is not in a financial situation to create fifty-one different NGDLC systems to conform with each and every line card scenario individual state mandate. Inevitably, such a disparity in requirements will obligate vendors to consider economies of scale and limit their products to only the most profitable markets,

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[36] *Comments of Alcatel*, *supra* n.. 18, at 15.

which will preclude innovative and competitive technologies from the rural and underserved markets.

### c. Mandatory Line Card Interoperability Will Hinder the Deployment of Advanced Telecommunications Capability to All Americans.

State or Federal mandatory line card interoperability will hinder the deployment of advanced telecommunications capability to all Americans, contrary to the Commission's obligations under §706 of the Act.[37] The customers being served by NGDLC systems are typically those in rural and less populated suburban areas that may not currently have access to broadband services or have a limited number of choices compared to those within the necessary distance to the central office. Mandatory line card interoperability will result in the ILECs significantly decreasing or halting the necessary upgrades to DLCs, which will preclude these rural customers from accessing the broadband services provided via this platform. The standardization alternative will also preclude many consumers from current or next generation broadband services as the incentives for vendors to innovate and increase the capabilities of these systems will be greatly minimized unless a competitive advantage and return on investment can be realized.

## E. The Commission Has Ample Authority to Preempt the Ability of the States to Mandate Line Card Unbundling.

The Commission has ample authority in the Act to preempt state regulatory action mandating line card unbundling. The record clearly supports that an order mandating line

[37] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, Title VII §706 (1996)(reproduced in the notes under 47 U.S.C. §157).

card unbundling would be costly, would stall innovation in this technology, and does not satisfy the unbundling restrictions in the Act. State inquiries have resulted in asymmetric regulation that discourages broadband deployment, contrary to the Commission's obligation under §706 of the Act. Further inquiries would aggravate the situation, with additional expenses and resources being dedicated to the issue and reducing incentives to invest in NGDLC upgrades.

Section 251(d)(3) provides the Commission with its clearest authority to preempt state line card unbundling mandates. This section states:

> "In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –
> (A) establishes access and interconnection obligations of local exchange carriers;
> (B) is *consistent with the requirements of this section*; and
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part."

This section provides both a floor and a ceiling to the Commission's preemption authority within the scope of ILEC network unbundling. Clearly, the Congress did not want the Commission to possess blanket preemption authority, recognizing that the state commissions had a unique appreciation of the competitive situation in their localities. However, Congress did not eliminate the Commission's preemption authority in this section; rather, it limited the Commission's authority to those situations in which state action was *inconsistent with the requirements of §251*. The requirements of §251 include the unbundling obligations of the ILEC be limited to "network elements," such network element unbundling be limited to any "technically feasible point" in the ILECs' network, access to proprietary network elements be mandated only when "necessary," and as noted in the *Iowa Utilities Board* decision, that the unbundling obligations be consistent with

the other stated objectives in the Act, including §706 requirements, the promotion of facilities based competition, and market certainty.

Several other sections within Part II of Title II of the Act provide the Commission with additional preemption authority. Section 251(d)(2) provides the Commission with exclusive authority to determine which network elements should be made available for the unbundling criteria articulated in §251(c)(3). Section 261(c) is similar to §251(d)(3) in that it provides for Commission preemption authority for intrastate services, so long as the inconsistency standard is satisfied. Finally, §706(a) obligates the Commission to utilize a multitude of regulatory methods to remove barriers to infrastructure development and advanced telecommunications deployment, including regulatory forebearance and "other regulating methods that remove barriers to infrastructure investment."

In the case of line card unbundling and interoperability, the Commission clearly has ample authority to hold that such unbundling is inconsistent with §251 and other objectives stated in the Act and to preclude any state action obligating such access and unbundling. As previously stated, the argument for line card unbundling and interoperability fails to satisfy §251 and other objectives of the Act for several reasons and continued state action on this matter would have a harmful impact on broadband investment. Congress specifically provided the Commission with preemption authority, and the application of this authority to NGDLC line card unbundling is clearly in the Public Interest.

## IV. Conclusion

The Commission should accelerate the review of these proceedings and rule that the line cards located in an ILEC's NGDLC are not separate network elements or, alternatively, rule the unbundling of these line cards is not at a technically feasible point in the network, fails to satisfy the heightened standard for proprietary network elements, and such an unbundling obligation would be contrary to the goals of the Act outside §251. Furthermore, the Commission should exercise its widespread preemption authority that the Congress delegated to it in various parts of the Act to prevent asymmetric state regulation in this matter.

Respectfully Submitted,

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